UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
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ORANGE COUNTY WATER DISTRICT,

Plaintiff,

v. 04 Cv. 4968 (SAS)

UNOCAL CORP., et al.,

Defendants.

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December 16, 2010
2:35 p.m.

Before:

HON. SHIRA A. SCHEINDLIN

District Judge

APPEARANCES

MILLER AXLINE & SAWYER
Attorneys for Plaintiff
BY: MICHAEL AXLINE

KING & SPALDING LLP
Attorneys for Defendant Chevron USA, Inc.
BY: CHARLES CORRELL

ARNOLD & PORTER LLP
Attorneys for Defendants BP and Atlantic Richfield
BY: MATTHEW T. HEARTNEY

SHEPPARD MULLIN RICHTER & HAMPTON LLP
Attorneys for Exxon Mobil Corporation
BY: JEFFREY J. PARKER

BLANK ROME LLP
Attorneys for Defendant Lyondell Chemical
BY: JEFFREY MOLLER
JOHN J. DiCHELLO, JR.

(Case called)

THE COURT: Good afternoon, Mr. Axline.

MR. AXLINE: Good afternoon.

THE COURT: Good afternoon, Mr. Correll.

MR. CORRELL: Good afternoon.

THE COURT: Good afternoon, Mr. Heartney.

MR. HEARTNEY: Good afternoon.

THE COURT: Good afternoon, Mr. Parker.

MR. PARKER: Good afternoon.

THE COURT: I recognize you.

MR. MOLLER: Jeffrey Moller for Lyondell Chemical.

MR. DiCHELLO: John DiChello, also for Lyondell.

MR. CORRELL: Mr. Wallace may be joining us in person. He was caught on the tarmac a couple of hours ago at National. We checked our BlackBerries in downstairs, but he said he was going to try and make it. He may come a few minutes later.

THE COURT: He is always welcome.

This is Judge Scheindlin. Who is on the phone?

MR. CONDRON: Peter Condron from Wallace King. I believe you have about eight other parties on the phone as well.

THE COURT: They are going to have to identify themselves one by one, but I must say, Mr. Condron, I assume you are just a live audience and don't intend to speak because you're familiar with the difficulties of our phone system. I

have to keep it on speaker so that the court reporter can take anything you do say, but the way the phone system works, and I have told you this before I think, if you're speaking there is absolutely no way for you to hear my voice. One voice cancels the other so I can't interrupt you. In real live court I give a stern look and say, all right, thank you, Mr. Heartney, sit down, and he will. But I can't say that to you because you are on the phone. So I really can't have eight lawyers on the phone being heard. You're welcome to listen in, and I don't think you're welcome to say anything.

That said, you can state your appearances.

So Mr. Condron has given his appearance.

MR. ANDERSON: Jon Anderson of Latham & Watkins for Conocophilips.

MR. WILFARB: David Wilfarb of Munger, Tolles & Olson on behalf of Shell defendants.

MS. DOYLE: Colleen Doyle on behalf of the Tesoro defendants.

MR. PEREZ: Ed Perez of Bracewell & Giuliani for the Valero defendants.

MR. PARDO: Jim Pardo on behalf of Exxon Mobil.

MS. VU: Monica Vu on behalf of G&M Oil.

THE COURT: Anybody else?

OK. We have got the eight appearances on the phone. For your own information, in the courtroom is Mr. Axline all

alone for the plaintiffs, Mr. Correll for Chevron, Mr. Heartney for Arco and BP, Mr. Parker for Exxon Mobil, Mr. Moller and his colleague for Lyondell. That's who is in the courtroom.

We are waiting potentially -- we are not waiting. We are expecting, hopefully, maybe, Mr. Wallace depending on his flight from Washington which was delayed.

Having now managed to get through all the appearances, we turn to the issue of the premotion conference, which is that the plaintiff Orange County -- who joined the conference?

MR. TEMKO: Bill Temko on behalf the Shell defendants. I am sorry I am a minute late.

THE COURT: You didn't hear the speech, but basically you're a passive audience. I won't be able to hear the nine people or so who are on the phone contribute to the argument, but you are welcome to listen in.

I started to say the topic of the conference is the plaintiff's request to make a motion for summary judgment, or maybe it's partial summary judgment, and they wrote a letter dated December 8 explaining their views. Then a response came in on December 13 from Arco explaining the defense views, more particularly Arco's views, but I think the defense views.

The letters did raise some interesting and important issues. The two that I consider procedural up front are, one, the timing of the motion, and, two, who should decide the motion. The defense is arguing that the transferee court,

that's me, should not decide the summary judgment, but that it should be sent back to the transferor court to decide.

There is also an issue of timing, in that I say in every case, even in this complex MDL but every other case too, you don't get multiple shots at summary judgment. If you think you're ready now, that's fine, but if you lose, you can't make it again on a better record.

So if the plaintiff is confident that now is the time, then now is the time. But plaintiff must realize that winning is one thing, but losing is another. You don't get a second shot. You know that, Mr. Axline, right?

MR. AXLINE: Yes, your Honor.

THE COURT: That's really, I would say, plaintiff's choice more than any ruling I would make. If the plaintiff feels this is a right time, an opportune time, and the record is developed enough to support the position, then I certainly would allow it at this time.

With respect to the second procedural issue, what court should decide it, I don't know that defendants' argument is that as a matter of law this court cannot do it. I think the argument is discretion.

Is that right, Mr. Correll?

MR. CORRELL: Yes, your Honor. It's your discretion. You have jurisdiction to do it. But as we set forth in the letter, what developing MDL case law says --

THE COURT: You read my face. He read my face for the people on the phone. I gave him a funny little nod at the notion of developing case law. Basically, you cited two recent district court opinions that have to do with an employment case, where every plaintiff, it would have to be decided what job category that plaintiff falls in with UPS. I don't know that that's really a developing trend.

I did look into this issue a little bit in terms of actually the plain language of the MDL rules, the governing statute 28 U.S.C. 1407 and the rules developed since then, and whatever annotations I could find as to what existed up till now. And while I am happy to hear you, I have to say I don't think these two cases of the UPS show any developing trend at all. The point is there would be thousands of these little fact specific plaintiffs, what category are you in.

The rules assume that summary judgment will in fact be decided by the transferee court prior to remand, and whatever little case law there was that reached to the circuit courts also said, of course, the transferee court certainly has the power, which you're not arguing, certainly has the power to do it.

I also note that the court, at the defendants' request, did decide a summary judgment in the Orange County case. The defense made a summary judgment motion based on statute of limitations. It was a complicated motion. I think

we had to brief it twice. It took a couple of years in the end, but it was made and decided, certainly without objection by the defendants since the defendants brought it in the transferee court. So in this particular case, I would find it troubling that it was OK for the defendants to bring their statute of limitations summary judgment, but somehow it isn't OK for the plaintiff to bring its motion for full or partial summary judgment. That would bother me in the same case to take an inconsistent view.

So I have to say, while I am happy to hear you, I am inclined to do it, and I think up till now I have done all the summary judgments, but go ahead.

MR. CORRELL: Two points. The reason I say developing case law, if you look at the Nuvaring Products Liability case, what the judge there says is, "Like other MDL judges before me, I find such case specific rulings are neither the purpose nor the forte of a court presiding over multidistrict litigation. An MDL seeks to promote judicial economy and litigation efficiency by allowing the transferee court to preside over matters common among cases. Given this function, the transferee court typically does not rule on cumbersome case specific legal issues."

And he cites a couple of cases. That's why I said developing law. He cites two or three. Then specifically to the In re Orthopedic Bone Screw Products case, in which there

is a finding that adjudication of summary judgment motions pertaining to state law claims would slow down the MDL process, thereby deferring state law dispositive motions to the transferor courts. And I think the reason that they do it is because when this case gets back to California, the trial court is going to have to figure out how to try this case. He is going to have to come up with jury instructions, he is going to have to rule on evidentiary issues, and a lot of times these case specific summary judgment motions will aid in that process.

If we look at the motions that the plaintiffs are talking about, they don't go to all defendants, they don't go to all the sites, and they are not even complete summary judgments at those sites. So, therefore, at the end of the day when we go through this, you will have basically the case in the same posture going back whether or not you decide these motions, and they won't have docket-wide implications. The OCWD in all this briefing proclaims how different it is from the other California plaintiffs. The OCWD act is in no other motions and it doesn't provide water. It's in a unique position.

As far as the defendants' motion for summary judgment, if your Honor will recall, in the four focus cases it was ordered that certain motions be brought on a schedule, and the defendants complied with that order.

THE COURT: But defendants didn't say, we are happy to bring the motion, but we don't think it belongs in the transferee court; we think we should make that motion in the transferor court and you should send it back for that purpose. It's true I issued a schedule, but you didn't raise this whole question.

Anyway, have you made enough of a record? I can't imagine in the exercise of discretion this could ever be a reversible problem, but I am not inclined to send it there. To me, pretrial proceedings means pretrial proceedings. I intend to complete the pretrial proceedings in this case. I have had long familiarity with this case. I have dealt with every issue in this case. Frankly, I think we will get it done faster than any district court in California, given the familiarity with the case, given the backlog and other people's dockets, given the known speed of this court in resolving motions.

I think given that, Mr. Axline, so far your flight wasn't worth it. You haven't gotten to say a word. Hopefully, that will change.

MR. AXLINE: So far it is worth it, your Honor.

THE COURT: You didn't get to argue anything. You just got to watch and smile from time to time.

Now, given the fact that I think I ought to do it, even though there are perfectly good arguments for not doing it, I do respect that, I think we ought to turn to the motion.

First of all, it is partial summary judgment. Your adversary is right. Is that true?

MR. AXLINE: That is correct, your Honor.

THE COURT: I misspoke earlier on the record. It's clearly partial. And he says it's not even against all defendants and all sites, right?

MR. AXLINE: That is correct, your Honor.

THE COURT: Fair enough.

I understand there is an argument about the fact that it may involve 20 sites but in your premotion letter you only address one representative site, and the defense seemed troubled by that. Once again, I seem less troubled by that. It is a premotion conference. He would have had to write essentially 20 two-and-a-half-page letters to get fact specific on each. I think what he is saying is the Arco example is representative of the issues, and if he can, at least for the premotion purpose, deal with the generic issues in this discussion, those generic issues apply to the 20 sites.

Now, when the briefing actually comes, I don't know, Mr. Axline, if your intention was to only move with respect to Arco and then say, and you should apply this ruling to 19 other sites, or were you planning to try to do one omnibus motion that did address facts?

MR. AXLINE: The latter, your Honor. We think, as you can probably tell from the letter, that there are common types

of evidence, a common pattern at all of these gas station sites, that will tee up the question of whether, given the property ownership, UST ownership, franchise control and control over the remedial process, and the uncontested fact of MTBE above the MCL at the site, is that adequate partial summary judgment with respect to nuisance, trespass and the Orange County Water District Act.

THE COURT: Right. But those are the facts in common. There are also facts that would diverge somewhat. So you would address each of the 20 sites in the motion.

MR. AXLINE: Correct.

THE COURT: Separately.

Does that meet your objection on that ground, Mr. Correll?

MR. CORRELL: It does not, your Honor. The reason is obviously Mr. Axline knows what sites he is talking about.

THE COURT: I didn't realize that. You don't know which the 20 sites are that he would intend to move on? I didn't appreciate that. I thought the defense knew.

MR. AXLINE: We haven't actually done the motion.

THE COURT: Of course not. But you must know the sites you intend to move on.

MR. AXLINE: There are a couple that we are still evaluating. We can tell the defendants now before we file the motion I suppose.

THE COURT: Tell them right now.

MR. AXLINE: I don't know them off the top of my head.

THE COURT: You didn't bring any piece of paper with you that tells you that? I bet you did.

MR. AXLINE: I did not. However, I can do it tomorrow.

THE COURT: But not for today's discussion. All right. Sadly, send him the list, but I thought you actually did know and you know which defendants would be involved in the motion.

MR. AXLINE: I do, and I identified the defendants.

THE COURT: That we do know.

MR. AXLINE: That I did. Obviously, they can figure it out. They know which stations they own and franchise. But I will send them the list.

THE COURT: How many sites will it be?

MR. AXLINE: 19, possibly one or two more.

THE COURT: Between 19 and 21. He said he has told you which defendants will be involved in the motion, and he will identify the sites before actually making the motion. But in terms of the premotion conference construct, while I appreciate your objection, it doesn't pay to put this off longer to discuss the 19 or 21 sites individually. There certainly are some common facts, as he said, and he did list them out. They were, all the sites are owned or leased by one

of the defendants, in each site the contamination has exceeded the MCL for a period of time, and in each case the defendant, who owns or leases, has engaged in apparently some amount of remediation. So those at least are common.

Now, Mr. Axline, you're not done. I think you have to answer some of the attacks, so to speak, that came in Arco's letter that weren't procedural. One is this notion of to establish a nuisance or a trespass as a continuing nuisance or trespass it must be, and this is a new English language word, it must be abatable. If it's not abatable, then it's, I guess, not continuing, it's permanent or done; it became permanent when it was not abatable.

So what do you have to say about this word abatable?

MR. AXLINE: Several things, your Honor.

One is that under the Orange County Water District Act, the act statutorily creates a presumption that the district's cost of investigation and remediation are reasonable and puts the burden on the defendants.

THE COURT: I think you're seguing to a slightly different topic. I didn't want to turn to the act, and I didn't want to turn to the shifting burdens. I wanted to really deal in a sense with the notion of continuing tort and time bar. So this concept of abatable is more in the common law claims of nuisance and trespass. I wasn't ready to move to the statutory claims and shifting burdens. Could we stay with

my question?

MR. AXLINE: Certainly, your Honor. I do want to make the point, however, that the valuation of the abatement issue is colored by the nature of the district and its powers.

Now, the leading case, in our view, on the abatement issue is the Mangini case in the California Supreme Court, and there the court did say that, in responding to a statute of limitations claim, a plaintiff asserting nuisance and trespass has the burden of establishing that the nuisance and trespass are abatable at a reasonable cost.

THE COURT: That's right.

MR. AXLINE: So the district is going to have the burden, and I think the thing we would like to brief to you is, when did that burden arise? Because we believe that it's appropriate to make the nuisance and trespass determination, and then the defendants raise the statute of limitations issue, and then the response to the statute of limitations at that point is, well, it can be reasonably abated.

THE COURT: I don't have any problem with the notion that statute of limitations is always an affirmative defense. So I think you're probably right that defendants raise it.

That was not really my question. My question is, is this amenable to summary judgment? Because whenever you hear the word reasonableness, you immediately think a fact determination or a judgment call or a jury; somebody has to

make a judgment call usually involving expert testimony and fact-finding. How am I going to do that on summary judgment and say as a matter of law something is reasonable? And even if I could do that, are we ready now without the expert testimony?

MR. AXLINE: Well, two responses. One is that we would like the opportunity to brief in a summary judgment motion to you why the district's abatement powers make that a question that is not a fact question in this case.

THE COURT: Can you develop that a little more for this record?

MR. AXLINE: Yes. Because the damage remedy that the district is seeking is abatement itself. So the damages that are ultimately going to be presented to the jury, as well as the question of whether the nuisance and trespass is continuing, will be presented to the jury at the time of trial.

THE COURT: So what am I deciding?

MR. AXLINE: The thing we want you to decide is that the evidence that we will present to you, the uncontested evidence that we will present to you on our motion shows that there is a nuisance, a trespass and a violation of the act at these stations.

THE COURT: But then I don't understand how you respond to the expected affirmative defense of statute of limitations without getting to this question of whether it is a

continuing nuisance and therefore they are not time-barred. You're sort of saying that the abatability question is down the road for the jury; the reasonableness of the treatment is for the jury later. But otherwise how am I going to deal with their statute of limitations issue?

MR. AXLINE: You're not, your Honor. I don't think you need to. You have given guidance generally on the application of the statute of limitations to the common law products liabilities claim. But it's clear from the Mangini case, and, frankly, the cases that the defendants cite, that the process for determining nuisance, trespass and continuation is a linear process. You first determine whether there is a trespass or a nuisance, and then you determine whether the statute of limitations applies, and then you determine whether or not it's continuing based on evidence.

THE COURT: Somehow you must be missing the notion of the word judgment in summary judgment. What can I decide if I can't decide that there is a timely claim of nuisance because it's continuing? Judgment is in the word summary judgment. What judgment can I give you? I can't give you just an advisory opinion on an element of a claim. What is the judgment?

I am not saying that every summary judgment is judgment on every claim in every case, but even partial summary judgment to me usually means some claims or some parties.

That's what makes it partial. It's not the whole case. But I have never heard of one element of one claim being amenable to a judgment.

MR. AXLINE: It is an interesting question. The amendments to rule 56 that just went into effect encourage the court, where it can, to identify discrete issues or claims, such as this, to treat them as on partial summary judgment grounds. In our view, and we will brief this to your Honor if you permit us to, the judgment will say that the district, assuming you agree with us, has proven its nuisance and trespass claims at these sites, but reserve for later the defendants' affirmative defense and the question of abatability. That's the way it would play out.

THE COURT: Let me interrupt you then.

What does the defense think of that?

Mr. Heartney.

MR. HEARTNEY: Your Honor, I think it simply misses the point, as your Honor was indicating, of the motion as it was described to us. What we had described to us was a partial summary judgment based on liability. We can't get to liability if an affirmative defense is out there and hasn't been adjudicated.

THE COURT: So you don't think he can sever out, so to speak, the affirmative defense and just say, if it turns out at the end of hearing the affirmative defense that it was timely

and continuing because it was abatable, then the Court has already found that there was as a matter of law a trespass or a nuisance merely because the water was contaminated above the MCLs?

MR. HEARTNEY: I think what your Honor would be talking about then would not be a partial summary judgment of liability. What your Honor would then be talking about would be severing out a discrete element of a claim.

THE COURT: That's right.

MR. HEARTNEY: What I would urge then is this is a very different kind of procedure than the summary judgment motion that the defendants asserted, because the summary judgment motion of the defendants actually decided something that determined that a claim was good or was not good.

THE COURT: Right.

MR. HEARTNEY: Simply picking out a single element of a claim and saying this element is established does not advance the ball. There is a very large amount of work, both factual and legal, that undoubtedly would happen if we had to take 20 stations and go through a briefing process. I think the premotion conference process that your Honor has put in place allows us to get to this and say, is this worth the candle, are we doing something that makes sense?

THE COURT: It might be too easy. It might be that you agree that, if it's timely, if it's abatable, which are the

real issues to be tried, there is no question that contamination above the MCL would be a nuisance or a trespass, if it's abatable and therefore timely. Since that's what is left to be decided, nobody much cares to brief the other half of it. If the contamination is above the MCL and everything else were in place, it's a nuisance.

MR. HEARTNEY: I think even there we would say, if the nuisance is confined to the shallow groundwater right in the area underneath the station, it's not being used for drinking water, there is no beneficial use for that water where it is, and if that's all the contamination they are pointing to, there is authority under California law to say that's not a nuisance.

MR. AXLINE: I don't think there is any such authority, your Honor.

THE COURT: Maybe Mr. Heartney knows it. What authority do you think that is?

MR. HEARTNEY: I think it is cited in our papers.

THE COURT: Why don't you tell us what it is?

MR. HEARTNEY: It's the Beck Development case, 44 Cal.App.4th (1996). I can describe the facts.

THE COURT: Take a minute. Mr. Axline heard the name of the case and maybe has it with him.

Do you have that one, Beck?

MR. AXLINE: I am familiar with that case.

THE COURT: Go ahead.

MR. HEARTNEY: In that case, there was a property that had been used as a railroad, and the railroad had a big pit, and it had poured a lot of fuel oil onto this pit years ago, and the pit had then been covered over and it was being used for farming, and so for many years the fuel oil that had been poured into the pit that was in the ground had been there. Then down the road the property was sold. The new owner got this piece of property and it was told to develop it he was going to have to go in and remove all the fuel oil. And the new property owner sued the railroad saying this is a nuisance, and this is a continuing nuisance, the same kind of argument here. It was a long time ago, but there is not a statute of limitations, it's a continuing nuisance.

And the court looked at this and said, under California law, the mere presence of the contamination there is not a nuisance. It's going to be necessary for you to prove that it creates a harm of the kind that constitutes a nuisance. And you would have needed to show, because this was a case -- I may not be right on this procedural point, but I believe it was after a trial or at least after some kind of hearing where all these facts had come out. You would have had to have shown that that fuel oil that's down there is either going to contaminate a drinking water aquifer or cause harm to people on the surface because they might come into contact with it. It's very far down. It's five or six feet down. You haven't

pointed to harm that's being caused by that, and because of that, you don't have a nuisance.

THE COURT: Mr. Axline said about two and a half minutes ago, I don't think there is any such authority, and I don't think Mr. Heartney can cite it. Well, he has, and how has he miscited it?

MR. AXLINE: In Beck there was failure of evidence. None of the agencies had -- in fact, all the agencies had declined to take any action with respect to the Beck property because they didn't think there was a contamination problem; they didn't think there was any harm at those sites. Here the defendants themselves affirmatively convinced you that there is harm at the sites that we want to seek summary judgment on. So Beck simply is distinguishable on its facts.

THE COURT: Because you're going to say the defendants have already conceded harm?

MR. AXLINE: Correct.

THE COURT: How did they concede harm, by saying so or by taking action to abate the harm?

MR. AXLINE: Both. And by asking you to find as a matter of law that there was harm for purposes of the statute of limitations. Now they want to do an about-face and say, well, there was really no harm for purposes of nuisance and trespass.

More importantly, there is a more recent case that we

cited to you. It's a Ninth Circuit case applying California law, California v. Campbell, in which the court said, and I am quoting from it now, "To state a claim under California law, California need not prove that trichloroethylene migrated from the release property to other areas. It is enough that the water under the release property itself was contaminated."

THE COURT: Read that again.

MR. AXLINE: I will give you the pinpoint cite here. This is 138 F.3d 772, at 782.

"Thus, to state a claim under California law, California need not prove that trichloroethylene migrated from the 20th Street property to other areas. It is enough that the water under the 20th Street property itself was contaminated."

THE COURT: Does that decision talk about the word harm? I understand the water underneath the property was contaminated. Mr. Heartney already said in Beck it said, that may be, but unless it causes harm, just the mere fact that it's contaminated is not enough. That the water in Beck apparently wasn't going to be used for anything, wasn't going to affect drinking water, it was just sitting there contaminated, and the court said, so what, essentially. Does this case talk about what is the impact of the fact that the water underneath the site is contaminated?

MR. AXLINE: It does under California law. And it grants summary judgment to the plaintiff.

THE COURT: Maybe it discussed harm.

MR. AXLINE: It didn't discuss harm in a lot of detail but --

THE COURT: If I did a word search, would I find the word harm?

MR. AXLINE: I suspect you would.

THE COURT: What does it say?

MR. AXLINE: There is another point I want to make here, which is that when the defendants moved for summary judgment, we argued to the court that the district is not harmed until the contamination moves off-site and threatens drinking water, and that's a fact dispute that we are entitled to put on evidence regarding. The Court rejected that argument at the defendants' insistence. Now Mr. Heartney is saying that there isn't harm. He is making the argument we were making in opposition of the motion on the statute of limitations in which he rejected.

THE COURT: And he then said that the harm was the mere contamination. The impact is there. There is contamination and that's harm. That's what he said then.

MR. AXLINE: Correct.

MR. HEARTNEY: To respond to that, your Honor, I guess what I would say is that our summary judgment motion was based on what the plaintiff's case was. And they took the position, the fundamental interest that they were talking about in the

case was to say that we own all the groundwater, we have a property right to all the groundwater. We didn't agree that they have that, but that's what they said, and your Honor had assumed that that was true in dealing with the cognizable interest claims that we had. We said, if that's the fundamental interest that you have in the case, then having MTBE in your property would be a harm.

That I think is different from, is there a nuisance? I think those are distinct points. But whether they are or not, the defendants, of course, we were simply taking a position that flowed from what the plaintiffs had told us was the interest that they claimed that they were building their case around.

MR. AXLINE: Your Honor, may I?

We went through an elaborate exercise, again at the defendants' insistence, of amending our complaint to make it clear that what we were talking about in the complaint was drinking water. And the defendants still made their argument. We responded that the district wasn't harmed until it moved off-site and threatened drinking water, and again that was rejected.

THE COURT: All right. So where are we left? All I said was that the part that you're seeking summary judgment on then might be terribly simple and not worth the cost of making a motion because it gets you only so far. It gets you to the

point, that if indeed there is contamination above the MCL at a certain site, if everything else falls into place, you have a nuisance or a trespass or both. But that's all it gets you. It doesn't get you judgment on that claim because there is an affirmative defense, and it will require possibly fact-finding or at least another determination after there is more evidence. So I don't know if the game is worth the candle because it gets you so little. It's almost as if, if you're right about this harm question now, you win, but you win the small point, so to speak.

MR. AXLINE: Your Honor, I think it significantly advances the ball if we get that determination. If the defendants are willing to stipulate, I suspect they won't, but if they were willing to stipulate, given these facts, there is a nuisance and a trespass at the site --

THE COURT: Assuming everything else falls into place.

MR. AXLINE: Assuming everything else falls into place. But given the fact that I started with, which is that the district is charged with abating these nuisances, and given the fact that you don't have to completely abate a nuisance in order to be entitled to recover for the damages of at least partially abating it -- under common law and under the statute by the way -- we think it's going to significantly advance the likelihood of settlement, one, and two, it's going to significantly narrow the issues to be tried to the issue of

abatement only.

THE COURT: Which you admit has to be tried before there could be judgment on the trespass or nuisance claim?

MR. AXLINE: Well, your Honor, we would like the opportunity to present to you the argument that, given the district's powers and the relationship between the act and the nuisance and trespass claims, the statutory presumption, and what we know about the defendants' answers -- the answers that the defendants filed here said in almost every case this kind of contamination is remedial, that's what the defendants conceded in their answers.

Now, they were doing that in response to a fear of a market share claim, but that's a judicial admission. We would like the opportunity to make the pitch that, at least at some of these sites, it's appropriate to find as a matter of law that the costs of abatement are reasonable. If that gets rejected, we go to trial on it.

THE COURT: Do you agree that expert testimony would be quite pertinent to that determination of this abatability issue?

MR. AXLINE: I think if we do not prevail on our arguments that you can determine it as a matter of law, then, yes, I think there will ultimately be some expert testimony on that. Although, frankly, your Honor, it's not rocket science anymore as to how you go about remediating and what it's going

to cost.

THE COURT: Mr. Heartney.

MR. HEARTNEY: I don't think that the type of evidence that Mr. Axline is talking about gets to what the abatability issue is really about.

We have two cases on that. The Beck case I think is the one that I would point to most prominently, because what it points to there was a situation in which a judgment based on continuing nuisance got reversed because the site had not been sufficiently characterized. There had not been enough expert and other scientific analysis of just what was the problem, how big is it, where is it going, what is going to happen to it, and there was not enough evidence of the methods and costs of what it would take to remediate it.

THE COURT: Was that a bifurcated judgment? You couldn't even have liability without getting to the details of the costs which is damages?

MR. HEARTNEY: This wasn't damages, your Honor, because this is an affirmative defense. You have got to remember here, if you don't have permanent nuisance, then you have to show that it's abatable. And the abatability analysis requires that you say, here is the problem, we have characterized it, we know what it is, this is what we say will remedy it, and here is our arguments as to why this is a reasonable means and a reasonable cost.

So the reasonableness pieces come in, and they come in after the plaintiff has shown, as a matter of fact, here is the animal we are talking about. That's not going to be possible unless we do get into evidence that goes far beyond what Mr. Axline is suggesting here. And I don't think that the entirely separate statutory presumption that's limited only to the costs recovery statute that they have, I think we will have to deal with that presumption when we are dealing with the statutory cost recovery claim, but it has nothing to do with nuisance and trespass.

THE COURT: I don't know that you can say it has nothing to do with it because he is saying, as a matter of law, abatement has to happen, and, frankly, as a matter of law, the costs of doing so is reasonable because it has to be done under statute. That's the summary of the argument.

MR. AXLINE: And one other distinction I would make between the Beck case that Mr. Heartney relies on and our case is a distinction that was present in the California v. Campbell case that I quoted to you earlier. And that is, in the Beck case and the other cases that they rely on, you had private actors and they were seeking damages. Admittedly, some of them also sought injunctive relief ordering abatement, but the primary focus was on damages. What was the cost to you of the diminution of your property value? We don't have that here. The district's sole focus is, how do we get this problem

cleaned up? And in the California v. Campbell case, the Ninth Circuit had no trouble saying, state, you have shown contamination of water beneath that site, you get partial summary judgment.

One other point that occurred to me --

THE COURT: When you say partial summary judgment, was that liability as opposed to damages? It didn't have this issue of nuisance or trespass and continuing versus permanent?

MR. AXLINE: No.

THE COURT: It was a statutory claim?

MR. AXLINE: Yes.

One other thing that occurred to me as Mr. Heartney was talking is that I think we have the presumption under the Orange County Water District Act that the costs are reasonable. I think that is particularly appropriate for a summary judgment motion here. The defendants are still going to want to try, perhaps, or maybe they will settle, but they are going to want to try whether the costs are reasonable. They are going to try to overcome --

THE COURT: They are going to try to?

MR. AXLINE: Overcome our presumption at trial.

THE COURT: It is a rebuttable presumption?

MR. AXLINE: It is rebuttable presumption, correct.

So that issue is going to be tried later anyway. The purpose of a partial summary judgment motion, as long as you're

looking at claims and whether you can preclude an entire claim, and especially in an MDL setting, is to narrow the things --

THE COURT: You can't preclude the entire claim. You really mean an element of the claim at best. You can't end the debate over whether at the end of the day you're going to be successful on a trespass or nuisance claim because there still is the issue of abatability.

MR. AXLINE: Correct.

THE COURT: So at best you could foreclose the trial on an element of that claim.

MR. AXLINE: Yes. I would suggest that it's not an element of our claim; it's an element of a defense. That's why I keep referring to the Mangini case, because in the Mangini case, the California Supreme Court made a point at the beginning of the opinion, and I will give you the pinpoint cite to this as well. This is 12 Cal.4th 1087 and the jump cite is 1097. The court went out of its way to say, at trial -- this came up after trial -- the question of whether any nuisance was a continuing nuisance was presented to the jury as an element of plaintiff's cause of action for a continuing nuisance. The question was not presented to the jury in the context of a defense or excuse by plaintiffs to avoid Aerojet's statute of limitations defense. The court then goes on to say, on appeal no party complains of the manner in which the matter was submitted to the jury, as an element of plaintiff's cause of

action rather than as an exception to the statute of limitations defense, which we believe is the logical way it should be presented. Thus, we need not consider whether there were any technical defects in the manner of presentation.

To me, that signals that, had it been raised, it should have been treated as a response to an affirmative defense rather than an element.

THE COURT: All right. Is there more to say about the trespass and nuisance claims?

MR. HEARTNEY: No, your Honor. To us the key point is that it doesn't lead to partial summary judgment on liability.

THE COURT: It doesn't, and I need to research whether a court can do it on less than the claim. And then, assuming the court can, should the court? Does it make any sense?

Let's go on to the Water District Act question. There I thought the argument is that plaintiffs can only recover costs that they have already incurred for cleanup, containment or abatement.

Has the district already incurred costs for cleanup, containment or abatement at all these sites? Because there is no declaratory judgment language in the act. I know you analogize it to CERCLA, but, in fact, CERCLA mentions declaratory relief and the Orange County Water District Act does not. My first question is factual. Has the district already incurred costs?

MR. AXLINE: Yes.

THE COURT: It has. At all of these sites?

MR. AXLINE: It has.

THE COURT: I thought the defendants thought otherwise.

Mr. Heartney, did you think otherwise?

MR. HEARTNEY: Your Honor, we believe that what the district has said are costs that it has incurred are simply litigation consultants that it has --

THE COURT: The shorter answer is?

MR. HEARTNEY: No.

THE COURT: You thought otherwise.

Go ahead, Mr. Axline. Tell me how you have incurred costs.

MR. AXLINE: We cited the Key Tronic case, which was admittedly a CERCLA case.

THE COURT: That's a good point. I told you already CERCLA has a declaratory judgment.

MR. AXLINE: I mean for purposes of costs.

THE COURT: But it's a different act.

MR. AXLINE: The act authorizes the district to recover incurred remedial costs.

THE COURT: Which act?

MR. AXLINE: The Orange County Water District Act. Not simply after cleanup is completed.

THE COURT: But it says incurred.

MR. AXLINE: We have incurred nonlitigation investigation and characterization costs at each of these sites. The defendants say they think they are only litigation related, but they are not. They are costs that the district incurred in the normal course of attempting to figure out what needs to be done ultimately to clean up these sites.

THE COURT: Do you know about that, Mr. Heartney? He says in each case the district has spent money on investigation and characterization which are required, in essence, to get to the point of remediation. You can't get there until you take the first two steps.

MR. HEARTNEY: I guess what I am familiar with is the answers to our interrogatories. And the answers to our interrogatories, when we said what costs have you incurred at each one of these stations that you can contend are recoverable under the Orange County Water District Act, the only thing that was pointed to were reports that were done by the Comex consulting firm and the Hargis consulting firm, both of which, when we have tried to get discovery concerning them, we have been told that their work is work product, and there have been work product objections raised to that. We view this as, they were retained by the district's counsel, not by the district itself, in at least the case of the first of those, the Comex.

THE COURT: Do you think you can get to the point of remediation, which I define as cleanup, containment or abatement, without doing an investigation and characterization? Can you skip over that and just hire somebody and say, come in and abate, I have no information for you, but please abate? Don't you need to do an investigation and a characterization first?

MR. HEARTNEY: I think what we would say is the question of whether these costs are potentially recoverable here will have to do with whether that's their purpose.

THE COURT: While they may be useful in litigation, the fact is can you get to cleanup, containment and abatement without having done an investigation and/or characterization? Because it seems to me that, while it's not uncommon that moneys spent for one purpose are also useful when you get around to litigation, but that doesn't mean it wasn't spent equally, so to speak, for another business purpose. Here the other business purpose is to set up the cleanup, containment and abatement, even though it's perfectly useful in a litigation.

I don't know that it loses its potential to help in setting up the cleanup, containment and abatement just because an attorney hired the consultant. Although I think your work product privilege point is interesting. I don't know how the plaintiff can protect it and then say, but this is our proof of

the costs we have incurred. If it's proof of costs, you won't be able to protect it as work product.

MR. AXLINE: If I may, Special Master Warner has already addressed this issue.

THE COURT: How has he come out?

MR. AXLINE: He has come out by saying that a consultant such as Comex and Hargis can wear two hats. They can do work that the district is going to use to investigate and clean up, and they can also do litigation consultant work.

Here we have provided the Comex and the Hargis reports to the defendants because, at least for the investigation and characterization part of this, we are not claiming --

THE COURT: OK.

MR. HEARTNEY: I guess what I would say is the statute itself sets a standard that I think goes beyond just the sequencing fact question. I acknowledge, your Honor, that if what your goal is to do is to clean up, you're going to investigate first. I don't have any question about that. The act says that the costs that are going to be recovered have to be actually incurred, they have to be necessary and reasonable in amount, and they have to in fact have resulted in pollution or contamination being cleaned up or remediated.

THE COURT: So it's the third prong that you feel hasn't been reached.

MR. HEARTNEY: Here, your Honor, we have put testimony

from the end of fact discovery, no more fact discovery, this was right at the end, in which we asked questions. We said, Are you planning to do any remediation? Can you tell us what you want to do based on this work that you have done and what is coming next, because we want to know that for our case. What they told us was, Well, based on the advice of our consultant, the Hargis consulting firm, we have identified stations at which we are going to go forward and do work to investigate and get to the point where we will know what we need to do, but this station isn't one of them. And that station was the one station that they provided information about in their papers, Arco 1887.

THE COURT: The premotion letters?

MR. HEARTNEY: Correct.

So I think our problem here is that they may have done these reports, and I think there is going to be a record in which we are going to say, no, these aren't remediation reports, this is in fact lawyer stuff, but the ultimate problem is, are these being used in a way that they would have to be used for them to be recoverable now?

It's one thing for the district to say, well, we need to have them before we can decide how we are going to remediate. We then asked them, what are you going to do and when are you going to do it? And the evidence is attached right to our letter. The answers we got at the end of fact

discovery was we don't know what we are going to do.

THE COURT: Is that true for all these sites, Mr. Axline, that you don't know what you're going to do with the recommendation anyway? And if so, how do you meet that third prong in the statute?

MR. AXLINE: It's not a third prong in the statute. They are just wrong about that. I have got the statute right here, and I can read it to you. Obviously, this would be briefed, but the statute says, it's a run-on sentence --

THE COURT: Not unusual for legislators.

MR. AXLINE: It says, "The person causing or threatening to cause that contamination or pollution shall be liable to the district, to the extent of the reasonable costs actually incurred in cleaning up or containing the contamination or pollution, abating the effects of the contamination or pollution, or taking other remedial action."

THE COURT: And your view is the other remedial action is the investigation?

MR. AXLINE: Right. The defendants' reading of this would eliminate the last two circumstances. They would say only after you finish completely cleaning up.

THE COURT: No. They would say, so long as you spent money on cleaning up. We are not arguing it has to be done, but you have to have spent it to clean up, and you haven't yet spent a penny to clean up. What you have spent is money to

prepare to clean up, at best, by investigating. And you're saying that falls in the third category of other remedial action.

MR. HEARTNEY: We say they haven't gotten to the point of remedial actions yet.

THE COURT: So this turns on the interpretation of the word remedial action. Is there legislative history what remedial action means? Is there case law?

MR. AXLINE: Not in the Orange County Water District Act, although we did provide the Court with one state court opinion in an Orange County Water District case that our firm handled, where the court found that the Orange County Water District Act was in pari materia with CERCLA and the HSAA.

THE COURT: In those acts the phrase remedial action has been defined?

MR. AXLINE: Similar phrases such as response costs.

THE COURT: The answer is no. The phrase remedial action hasn't been defined anywhere.

MR. AXLINE: Correct.

THE COURT: Yes.

MR. PARKER: If I could just add one point to what Mr. Heartney mentioned.

THE COURT: Just one second.

Mr. Parker.

MR. PARKER: In the depositions of the district's

person most knowledgeable on the issues of this work they were performing, the investigative work, we all specifically asked, when you get these results back -- they hadn't even embarked on any work. The district's board had apparently authorized the contract but nothing had been done. And we asked them, What is the next step when you do these four different cone penetrometer borings?

THE COURT: Say it again, please.

MR. PARKER: It's shortened to CPT for cone penetrometer testing. It's a type of testing that's done. And the district's witness said, I don't know what we will do until we get those results. We may have to do more borings in different places. We may have to put in groundwater wells to see what is there. And we asked, Can you tell what remediation will have to be done? And the witness said, No, I can't tell you until we go through these steps.

So your Honor's point about those steps maybe being prefatory steps to remediation, the contrary is also true. If they determine that nothing needs to be done, or that a plume that they thought extended way off-site in fact doesn't, there may be ultimately no remediation done and that's our point.

THE COURT: What about that, Mr. Axline? If the investigation shows that there is no need for further action, has there still been remedial action?

MR. AXLINE: Yes, because remedial action includes the

cost of investigation and characterization.

THE COURT: That finds no need for action. That's called remedial action?

MR. AXLINE: Yes.

THE COURT: What did it remediate?

MR. AXLINE: In the very narrowest sense, perhaps it confirms the remediation that has already occurred has taken care of the problem.

THE COURT: I thought there are many sites here where not a penny has been spent on remediation.

MR. AXLINE: No. I'm sorry?

THE COURT: We started this because the investigation or characterization, they are both used together, is the only money that has been spent. There hasn't been any money spent on cleanup or abatement. So you can't come up with the answer that what has been spent so far is enough, we don't need to do more. I thought some of these places haven't spent any money.

MR. AXLINE: Well, the defendants have been doing remediation on-site is what I was referring to.

THE COURT: So the report says, no need for anything further. We have investigated and we are satisfied that whatever the defendants have spent is enough. We don't have to spend anything.

MR. AXLINE: Under any other statute, CERCLA, the HSAA, that would be considered a response cost regardless, and

you would be able to recover that.

THE COURT: Just to confirm that it's satisfactory now, it doesn't need more?

MR. AXLINE: Yes. There was contamination there. It came from the defendants. The district or any plaintiff I guess had to do some investigation and characterization. And the defendants should thank their stars if that shows that no further work is necessary. I don't think that's going to be likely in any of these cases, but regardless, that typically is a recoverable cost, and we think it is under the act as well as under CERCLA.

THE COURT: Although while admitting at the same time that it hasn't been construed yet specifically under the Orange County Water District Act, the term remedial action has not yet been construed.

MR. AXLINE: I would suggest that it has by Judge Colaw in the opinion that we attached. I don't remember if he parsed the phrase remedial action. That was all briefed to him, and he said in his opinion that we attached to our brief or letter --

THE COURT: Which was that?

MR. AXLINE: It's Exhibit 6, the last exhibit to our premotion letter.

THE COURT: OK. This was Orange County Water District v. Northrop Corporation.

MR. AXLINE: Yes. There I will represent to the Court that the facts were as they are here. No actual sort of pipes and concrete remedial work had been done. There had only been investigation and characterization. And Judge Colaw found that both the Orange County Water District Act and the HSAA, and case law interpreting those acts, authorized the district to recover for incurred expenses of remediation and future costs.

THE COURT: Well, I don't see that in the one page decision.

MR. AXLINE: It's admittedly brief.

THE COURT: Where do you see it?

MR. AXLINE: There is a first page that is sort of notice.

THE COURT: I am in the decision, pages 1 and 2 of the decision.

MR. AXLINE: Paragraph numbered 1. I was reading the second sentence. Both the OCWDA and the HSAA and case law interpreting those acts authorized the district to recover for incurred expenses for remediation and future costs.

THE COURT: I can't tell from that small statement whether any moneys had been spent at the time the court wrote that. There may have been some money spent already.

Now, true, the phrase "and future costs," well, they weren't spent yet. I assume this is a trial court. This is a lower court.

MR. AXLINE: Yes, it was. But the state of play at the time of this decision was that the district, as here, had spent some initial money investigating and characterizing.

THE COURT: And that's all?

MR. AXLINE: Yes.

THE COURT: Do you know that case enough to know if you agree with it?

MR. PARKER: I do not. I represent a defendant in another case, the one that the defendants submitted the rulings saying there is no declaratory relief and there is no future costs recoverable under that.

THE COURT: Which exhibit is yours?

MR. PARKER: Exhibit C Mr. Heartney tells me. C and D.

THE COURT: One second.

So C is the Sabic case?

MR. PARKER: Yes.

THE COURT: Where is the operative language?

MR. PARKER: The operative language is --

THE COURT: These courts are a model of short decision writing. I have a lot to learn from these courts. One page. I have got to change my ways.

MR. PARKER: Exhibit C is the notice of ruling, and then Exhibit A to the notice of ruling. The top one, demur and motion to strike, demur to first cause of action. That is

where the judge held that declaratory relief was not available.

THE COURT: That's obvious because it's not a statute. But go ahead.

MR. PARKER: It was raised --

THE COURT: I know. Plaintiffs can only recover costs that were already incurred for cleanup, containing or abating the contamination or other remedial acts. Not a surprise because that's a direct quote of the statutory language. That doesn't tell us how that court defines remedial acts that I know of.

MR. PARKER: Your Honor, what happened in between is the district, in response to the ruling, amended their complaint, and instead of seeking the recovery of future costs, instead sought declaratory relief. And that ruling by Judge Nancy Wieben Stock, at paragraph 3 in the substantive part, says, "Defendants' motion to strike OCWD's allegations concerning declaratory relief in the first cause of action is granted." And that first cause of action was the Orange County Water District Act claim.

So those two taken together support the point that the district, represented by Miller Axline, asserting these same claims under the act, the court found future costs are not recoverable and declaratory relief for liability for future costs is not recoverable.

THE COURT: Is that right, Mr. Axline?

MR. AXLINE: Not exactly.

THE COURT: In what way was it not right?

MR. AXLINE: The district had a separate count for declaratory relief under California's Omnibus Declaratory Relief Act that's referred to in this language. On demurs and motions to strike in California the court is very particular about separating out causes of action, and what Judge Wieben Stock said here was, there is nothing in the act that provides for declaratory relief, and I am not going to let you include in this first cause of action a request for declaratory relief under the act. She did not address, although it has been discussed with her in subsequent conferences, the sixth cause of action, where we say we get declaratory relief under the Omnibus Declaratory Relief Act once we have shown that we have liability under the Orange County Water District Act. So this was merely a parsing of counts in the complaint.

MR. PARKER: That's not true. I agree that they pled a claim under the California declaratory relief statute that wasn't challenged on demur because it wasn't amenable to the challenge. But they sought specific relief under the Orange County Water District Act and the court held as a matter of law they were not entitled to that. That is a ruling interpreting this specific law here. Regardless of whether under some other claim they may have served they are entitled to declaratory relief, that's a separate issue, and that's what is addressed

in the other cause of action. This is absolutely clear on the record that declaratory relief and future costs are not available under the act.

THE COURT: Well, all right. But that's only a part of plaintiff's argument anyway. Plaintiff argues that, I think, Mr. Axline, you have already expended moneys, and that comes to defining the term other remedial action. As far as you're concerned, the investigation and characterization costs are already spent.

MR. AXLINE: Yes.

MR. HEARTNEY: Let me go to one other point that we also raised. As to those costs, you asked a very good question and very important question when you said, all right, if all that you have is money that was spent to investigate and it hasn't led to any actual remediation, and it might end up leading just to a report that says, well, actually, nothing needs to be done, then, your Honor, I think that possibility leads us directly to the point that under the act no defendant may be required to pay money for a cost or expense until it has been able to submit evidence to rebut whether the work was necessary or the costs were reasonable.

I think it's important here that California has a comprehensive scheme to clean up pollution that covers the whole state. The Orange County Water District Act covers one county. California has a comprehensive scheme which puts

responsibility for cleaning up in the Regional Water Quality Control Boards. They are already out there cleaning up. They are already out there requiring the defendants to clean up. And I cannot imagine it will not be a disputed fact if Mr. Axline was to come in and say, well, we decided that even though the Regional Water Quality Control Board, the statewide authority on this, was already cleaning up and already controlling things, we weren't sure that they were doing a good job so we wanted to do our own investigation. We did and it turned out we found out we didn't need to do anything, but we still are entitled to recover that money from the defendants as the necessary and reasonable costs. I think we can readily develop evidence, including expert evidence, that would say that money was wasted. There was no need for that money since we had an expert regulator already doing this. The expert regulator for the state of California is throughout the state doing this sort of thing.

So it's going to get to the same point. We are still going to be faced with an issue of whether, if they have not done work that has led to or reached a conclusion on some remedial work that actually needs to be done, whether they will be able to get a summary judgment that will establish any liability or move the ball forward in any sense.

THE COURT: Certainly both proposed prongs of the motion for partial summary judgment have pitfalls for

plaintiff's side that may insnare them, but if they wish to try, the usual practice is to say yes, you can go ahead and make your motion, considering all that you have heard from the premotion conference, but you won't be able to do it again. Keep that in mind. If you think that after listening to the argument and the exchange of letters you have a reasonable chance of prevailing and wish to bring the motion, in the face of some of these difficulties, OK. We set the schedule and you go ahead. My practice is to use this as essentially the oral argument so everybody should congratulate themselves on being clear today on the arguments. Generally, then I take it on the papers.

Assuming you wish to proceed, Mr. Axline, on both prongs of this, I need a proposed schedule, and I want to talk about page limits, because we have covered this many times and everybody says their case is the big exception for page limits, I can't possibly do this in 25 pages. But I have to say, after hearing this argument, there are very discrete and legal issues, on both prongs. On the first prong, the nuisance and trespass, you basically say it's quite a simple motion, the presumption under the statute means that my expenses are reasonable and it is continuing and it's harm as a matter of law, and I cite a couple of cases, I win. On the second point, your argument is also fairly straightforward, at least until the rebuttal. And it says, the statutory language, other

remedial action should be construed to include investigation and characterization, and I spent that money so I fall under the statute, and that's the ball game at this point, short of any actual damages. It's a fairly straightforward and moving brief. Then it gets complicated. Once the arguments are raised, you might have a need for more pages on the reply than usual, but I think the motion is fairly straightforward, and I am not inclined to grant what I know is the inevitable request for extra pages.

When can you make the motion, Mr. Axline? Assuming you decide to proceed, when do you want to do it?

MR. AXLINE: I think we can get it filed by the end of January, say February 1st and on.

THE COURT: So you need a lot of time. You want six weeks to file it.

MR. AXLINE: Yes. I say that not because there are going to be a lot of pages. I heard what you said about the page limits. But we do need to assemble just the excerpt pages for each one of these stations.

THE COURT: If it is limited to the mere fact of the contamination above the MCL, or the mere fact that there has been an investigation, that's not very many pages. But if that's what you say it takes, that will be Tuesday, February 1.

How long would the defense want to respond?

MR. HEARTNEY: Taking into account that we don't know

what stations we are talking about --

THE COURT: You will know that tomorrow.

MR. HEARTNEY: There are 20 stations. There are multiple defendants. I know we are only going to get one brief, and I recognize that. But that makes it a little more difficult to make sure we can pull everybody's stuff together. I think we need at least 75 days, your Honor.

THE COURT: Two and a half months? I wouldn't even dream about two and a half months. I wasn't really dreaming about six weeks, but if you said, in fairness, you gave them six, how can you really give us less when we have to coordinate with bunches of co-defendants. The legal issues are uncommon and they are well delineated now on this record. I get the point. There are not a lot of cases to look at. Some issues of law go back 50 years and you end up looking at hundreds of pages and various circuits and getting yourself completely confused. This isn't like that. This is a California statute, California law, virtually no case law, for example, on the phrase other remedial action. It's really kind of a first impression. Yes, you might analogize it, you might not. That's for the court to decide. But I don't think it's all that complicated. Nor did I think the other part was all that complicated, because if you're right about needing to consider the statute of limitations issues now, it might be that it can't be disposed of on summary judgment and the short answer

is denied.

I don't think it's all that complicated, and I think even six weeks is long and it's plenty. So March 15.

Mr. Axline, to reply? And any pages you don't use you can add to the reply. How long would you like?

MR. AXLINE: I will say three weeks.

THE COURT: That's a long schedule. That's April 5. That's so long that I would ask you please not to ask for extensions. I am not going to give them. But if you want to negotiate within those dates with each other, I am not going to know and I am not going to care, as long as it's fully submitted on April 5. So that is the schedule.

What about these page limits? I assume the defense is coordinating on the legal arguments, but may need a small number of extra pages per site to make the fact argument. He says hopefully three pages per cite. If you really have 20 sites, you might need a 60 page appendix, separated out of the 25 page brief, where you simply say, we have to show you enough facts per site for you to get our point. But the legal issue, there is no need to extend the pages at all. I get it from today. As I say, there's not a lot of case law, not a lot of years, not a lot of circuits. It's only going to be in the Ninth Circuit. It's only one state. So there can be a fact appendix, so to speak, but the legal brief is 25 pages. And one brief. Somebody will take the lead and everybody else will

edit your work.

Anything else?

MR. AXLINE: There is one other thing. I just wanted to preview for the Court and for the defendants that we have reached a settlement in principle with a minor defendant in the Orange County Water District case. The papers are being drawn up.

THE COURT: Who might be this minor defendant?

MR. AXLINE: Actually, they asked it not be disclosed until the papers are filed. So I am not at liberty to say that. But what I did want to preview is that when we file the papers, both parties would like to get it done by the end of the year, we will ask the Court to instruct the defendants to indicate in a 10 or 12 day period whether they intend to object or not.

THE COURT: Do I have to do a good faith assessment?

MR. AXLINE: Yes. We would like you to direct the defendants to indicate whether they intend to object. If not, then we would like to try to get it done by the end of the year.

THE COURT: Defendants will have two weeks from the time they receive notice to decide whether to object or not. If they decide affirmatively, then they can have two further weeks to file any objections. So you have a total of 30 days to file, but two weeks to decide.

MR. HEARTNEY: If I could just ask for clarification, not to change those times, but when we get notice, that we get the necessary information, what the terms of the settlement are.

THE COURT: How else can you decide whether to object?

MR. AXLINE: That will all be in the papers.

THE COURT: All right. I think we are done.

Thank you all for coming in and thank the folks on the phone. Obviously, the transcript must be ordered. This is the argument and I do need this.

(Adjourned)